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No. 95-1665

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

BALANDRA SCHIFFAHRTS-GESELLSCHAFT
MBH & CO., KG,
Petitioner,
v.
DANIEL COSTA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Ninth Circuit's formulation of the "turnover duty" — that an owner must turn a vessel over to a stevedore free of any hazards that "present an unreasonably dangerous work environment to experienced longshoremen exercising reasonable care" — contrary to this Court's opinion in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), which makes clear that the "turnover duty" focuses on the ability of the stevedore, not the longshore worker, to conduct cargo operations with reasonable safety?

2. Does an injured longshore worker have the burden of showing that he had no reasonable alternative to avoid an obvious hazard, as the Third and Fifth Circuits have held, or does a longshore worker have no such burden, as the Ninth Circuit has held in this and other cases?[1]

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[1] The parties to the proceedings in the Court of Appeal are named in the title of this petition. Petitioner Balandra Schiffahrts-Gesellschaft MBH & Co., KG, has no parent or subsidiary companies. Campagnie Generale Maritime et Financiere was named as a defendant in the complaint, but was never served and did not participate as a party to the proceedings in the district court or the Court of Appeals.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Ninth Circuit is printed in Appendix A. The opinion of the district court is printed in Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was filed and entered on February 27, 1996 (Appx. A). This Court has jurisdiction pursuant to Section 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISION INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, Section 905(b) of Title 33 of the United States Code provides:

"(b) Negligence of vessel

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

The opinion of the Court of Appeals summarizes the pertinent facts and district court proceedings:

> "On July 25, 1992, [plaintiff] Costa was injured as he worked as a longshoreman on the CGM Lorraine, a vessel owned by [defendant] Balandra. Costa tripped over a coaming and fell into a [sic] uncovered hatch opening. In his deposition, Costa testified that as he fell, he injured his right leg as it struck the deck. He further testified that he injured his back and neck and bruised and scraped under his arms. Costa contends that Balandra was negligent because it failed to paint the coaming a contrasting color to the deck and because it failed to cover the hatch opening."

Appx. A, p. 2a.

> "Costa alleges that Balandra negligently turned over an unreasonably safe vessel for loading and is therefore liable pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, for injuries Costa sustained working on the vessel."

Appx. A, p. 2a.

> "Balandra moved for summary judgment on two grounds, and the district court granted the motion without explanation. Balandra argued that Costa failed to raise a genuine issue of material fact because (1) it was undisputed that Costa had a reasonable alternative to tripping over the coaming, and (2) the absence of contrasting paint and a hatch covering were, as a matter of law, insufficient to establish negligence."

Appx. A, p. 2a.

Plaintiff Costa appealed to the Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. section 1291. The Court of Appeals reversed.

First, following prior Ninth Circuit cases, the Court of Appeals held that under the "turnover duty of safe condition," "[w]hen the vessel owner turns the vessel over to a stevedore, it must be free of any hazards that 'present[ ] an unreasonably dangerous work environment to experienced longshoreman exercising reasonable care.' " Appx. A, p. 3a. Applying this test, the Court of Appeals concluded that "[w]hether the lack of [contrasting] paint or the lack of a hatch cover were hazards that were 'unreasonably dangerous to longshore workers [is] a question of fact for the jury.' " Appx. A, p. 4a.

Second, the Court of Appeals rejected defendant Balandra's argument that plaintiff Costa "was required to show that he had no reasonable alternative to avoid tripping over the coaming, and that Costa failed to make any showing on this issue." Appx. A, p. 3a. Relying upon prior Ninth Circuit cases, the Court of Appeals held that "Costa was not required to show that he did not have a reasonable alternative to tripping over the coaming." Appx. A, p. 3a.

REASONS FOR GRANTING CERTIORARI

This case has broad impact upon maritime law and the relationship among longshore workers, their stevedore employers, and shipowners.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court held that a shipowner must, among other things, exercise

> "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced *stevedore* will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property."

451 U.S. at 167 (emphasis added). Under *Scindia*, the "turnover duty" focuses on the ability of the stevedore, not

the longshore worker, to conduct cargo operations with reasonable safety.

The Ninth Circuit's formulation of the "turnover duty" in this and other cases ignores this aspect of *Scindia*. Under the Ninth Circuit's formulation, a shipowner must turn a vessel over to a stevedore free of any hazards that "present[] an unreasonably dangerous work environment to experienced *longshoremen* exercising reasonable care." Appx. A, p. 3a (emphasis added). The Ninth Circuit has shifted the focus away from the *stevedore's* ability to conduct operations safely.

The decision is of crucial importance to all of the parties involved in cargo operations — longshore workers, their stevedore employers and shipowners alike. The Ninth Circuit's formulation of the "turnover duty" is inconsistent with *Scindia*, and creates doubt and confusion as to the proper scope of that duty. As a practical matter, shipowners now have no idea whether to prepare a vessel so that a stevedore can conduct cargo operations with reasonable safety, or whether to attempt to anticipate what the longshore workers under the stevedore's supervision might require as a work environment. It is essential that this Court clarify the "turnover duty" and resolve the focus of that duty — either the stevedore or the longshore worker.

This case also presents a conflict among the Circuits on a related issue. The Third and Fifth Circuits have held that an injured longshore worker has the burden of showing that he had no reasonable alternative to avoid an obvious hazard. *Kirsch v. Plovidba*, 971 F.2d 1026, 1030 (3d Cir. 1992); *Morris v. Compagnie Maritime des Chargeurs Reunis*, 832 F.2d 67, 70-71 (5th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). In this and other cases, the Ninth Circuit has held that a longshore worker has no such burden. Unless this conflict is resolved by this Court, a longshore worker will have different rights depending upon whether he is working

on a vessel docked in San Francisco, New Orleans or Philadelphia. This conflict should be resolved.

I.

THE NINTH CIRCUIT'S FORMULATION OF THE "TURNOVER DUTY OF SAFE CONDITION" IS CONTRARY TO THIS COURT'S OPINION IN *SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS*, 451 U.S. 156 (1981).

This case arises under section 5(b) of the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. section 905(b), which provides that an injured longshore worker may bring an action against a vessel for injury "caused by the negligence of a vessel." 33 U.S.C. § 905(b). Under § 5(b), "a shipowner must exercise ordinary care to maintain the ship and its equipment in a condition so that an expert and experienced stevedore can load and unload cargo with reasonable safety." *Howlett v. Birkdale Shipping Co.*, ____ *U.S.* ____, 129 L.Ed.2d 78, 84 (1994).

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court outlined the duties of a shipowner, including what has become known as the "turnover duty." *See Howlett*, 129 L.Ed.2d at 87. Under the "turnover duty," a vessel must exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property." 451 U.S. at 167. In the course of its analysis, *Scindia* makes clear that section 41 of the Act places the primary responsibility for the longshore worker's safety on the stevedore. 451

U.S. at 170, 176.[2] The stevedore is in the best position to avoid accidents during cargo operations. 451 U.S. at 171. As a general matter, a shipowner may rely on the stevedore to avoid exposing the longshore worker to unreasonable hazards. 451 U.S. at 170.[3] Thus, under *Scindia*, the "turnover duty" focuses on the ability of the stevedore, not the longshore worker to conduct cargo operations with reasonable safety.

The Ninth Circuit has followed a different rule. Following prior Ninth Circuit cases,[4] the Court of Appeals held that "[w]hen the vessel owner turns the vessel over to a stevedore, it must be free of any hazards that 'present[] an unreasonably dangerous work environment to experienced longshoremen exercising reasonable care.' " Appx. A, p. 3a. The Ninth Circuit's formulation of the "turnover duty" is inconsistent with the Act, which places the primary responsibility for the longshore worker's safety on the stevedore — the party in the best position to prevent accidents. It is the stevedore, not the shipowner, who has the responsibility for providing its longshore worker employees with a "reasonably safe" place to work. *See* 33 U.S.C. § 941(a).

Clearly, resolving this issue is of crucial importance to longshore workers, their stevedore employers, and shipowners.

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[2] *See* 29 C.F.R. §§ 1918.1-1918.2(a) (1994).

[3] In *Scindia*, this Court granted certiorari after the Ninth Circuit had reversed a district court's granting of summary judgment. 451 U.S. at 159.

[4] *Martinez v. Korea Shipping Corp.*, 903 F.2d 606, 610 (9th Cir. 1990); *Thomas v. Newton Int'l Enter.*, 42 F.3d 1266, 1269 (9th Cir. 1994).

II.

IN HOLDING THAT AN INJURED LONGSHORE WORKER DOES NOT HAVE A BURDEN OF SHOWING THAT HE HAD NO REASONABLE ALTERNATIVE TO AVOID AN OBVIOUS HAZARD, THE NINTH CIRCUIT HAS CREATED A CONFLICT WITH THE THIRD AND FIFTH CIRCUITS.

This case presents an important conflict among the Circuits on the issue of whether an injured longshore worker suing a shipowner for violating the "turnover duty" has the burden of showing that he had no reasonable alternative to avoid an obvious hazard.

The Fifth Circuit has held that an injured longshore worker has the burden of showing that "the circumstances made safer alternatives unduly impractical or time-consuming." *Morris v. Compagnie Maritime des Chargeurs Reunis*, 832 F.2d 67, 71 (5th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). Thus, a shipowner is not liable where an injured longshore worker and the stevedore "could have avoided the danger with almost no interruption of their work." 832 F.2d at 71.

Similarly, the Third Circuit has held that "where a danger is obvious but easily avoidable, the shipowner will not be liable for negligence." *Kirsch v. Plovidba*, 971 F.2d 1026, 1030 (3d Cir. 1992). In a variation of the Fifth Circuit rule, the Third Circuit has concluded that "a shipowner may be liable for failing to eliminate an eliminable obvious hazard only if it should have expected that its expert stevedore would not avoid the hazard and conduct cargo operations safely." 971 F.2d at 1033.

In contrast, the Ninth Circuit here has rejected petitioner's argument that plaintiff "was required to show that he had no reasonable alternative to avoid tripping over the coaming, and that [plaintiff] failed to make any showing on

this issue." Appx. A, p. 3a. Relying upon prior Ninth Circuit cases,[5] the Court of Appeals held that plaintiff "was not required to show that he did not have a reasonable alternative to tripping over the coaming" (Appx. A, p. 3a) — a holding directly at odds with the holdings of the Third and Fifth Circuits.

This Court's recent decision in *Howlett v. Birkdale Shipping Co.*, ___ U.S. ___, 129 L.Ed.2d 78 (1994), leaves unresolved the issue of whether an injured longshore worker has the burden of showing that he had no reasonable alternative to avoid an obvious hazard. In *Howlett*, the plaintiff had jumped down to the "tween" deck, where he slipped and fell on a sheet of clear plastic that had been placed under the cargo. 129 L.Ed.2d at 85. After analyzing the shipowner's duty to warn the stevedore of known hazards, this Court went on to note:

> "All this does not mean that the vessel is not entitled to summary judgment. [Plaintiff] Howlett's own witnesses stated that the plastic was visible, even from the top deck, during unloading operations. Howlett must overcome these submissions, for even assuming the vessel had knowledge of the tween deck's condition, he must further demonstrate that the alleged hazard would have been neither obvious to nor anticipated by a skilled and competent stevedore at the discharge port."

129 L.Ed.2d at 92. However, this Court did not discuss the issue further, as it had not been addressed by the district court in *Howlett*. 129 L.Ed.2d at 92.

Contrary to the holdings of the Third and Fifth Circuits, the Ninth Circuit has adopted a rule that allows a longshore worker to assert a negligence claim against a shipowner for

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[5] *Thomas v. Newton Int'l Enter.*, 42 F.3d 1266, 1268-69 (9th Cir. 1994) (Reinhardt, J.).

leaving an obvious hazard that could have been avoided by the longshore worker.[6] If this conflict is left unresolved, a longshore worker's rights will depend solely on the Circuit in which his port is located. This conflict should be resolved.

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[6] It is undisputed that the alleged hazard was "open and obvious" to both the stevedore employer and its longshore workers. Furthermore, it is undisputed that the stevedore employer and its longshore workers easily avoided the alleged hazard many times before the accident. In its Statement of Uncontroverted Facts in support of its summary judgment motion, petitioner established (with supporting evidence) the following facts, which were not disputed by plaintiff in his Statement of Genuine Issues in opposition to summary judgment:

Plaintiff had worked on the CGM Lorraine on at least two previous occasions, during which he used the access ladders and the access ladder hatch openings. On both those occasions, the coaming surrounding the access ladder hatch openings were not painted a contrasting color. Plaintiff never had an accident on those previous occasions when stepping over the coaming surrounding the access ladder hatch openings. Plaintiff never made any complaint to the superintendent regarding the hatch openings, the access ladder or the alleged deficiency of painting on the coamings. *See* Statement of Uncontroverted Facts, pp. 2-3, 7.

The stevedore's superintendent, Patrick Harmon, had worked on the CGM Lorraine on three or four prior occasions. Mr. Harmon has never had any problems walking over the coaming square, which has never been painted a contrasting color from the walking platform. Mr. Harmon has never requested that the vessel crew place a hatch cover over the access ladder hatch opening or paint the coaming square a contrasting color. *See* Statement of Uncontroverted Facts, pp. 8-10.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed February 27, 1996]

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-55726

D.C. No. CV-93-01530-TJH (Tx)

MEMORANDUM*

DANIEL COSTA,
Plaintiff-Appellant,

vs.

CAMPAGNIE GENERALE MARITIME ET FINANCIERE;
BALANDRA SCHIFFAHRTS-GESELLSCHAFT
MBH & Co., KG,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, J., District Judge, Presiding

Argued and Submitted February 5, 1996
Pasadena, California

Before: BEEZER, BRUNETTI and NOONAN, Circuit Judges.

Daniel Costa, an injured longshoreman, appeals a grant of summary judgment for defendant vessel owner, Balandra Schiffahrts-Gesellschaft MBH & Co., KG ("Balandra").

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* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Costa alleges that Balandra negligently turned over an unreasonably safe vessel for loading and is therefore liable pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, for injuries Costa sustained working on the vessel. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, and we reverse.

I

On July 25, 1992, Costa was injured as he worked as a longshoreman on the CGM Lorraine, a vessel owned by Balandra. Costa tripped over a coaming[1] and fell into a uncovered hatch opening. In his deposition, Costa testified that as he fell, he injured his right leg as it struck the deck. He further testified that he injured his back and neck and bruised and scraped under his arms. Costa contends that Balandra was negligent because it failed to paint the coaming a contrasting color to the deck and because it failed to cover the hatch opening.

Balandra moved for summary judgment on two grounds, and the district court granted the motion without explanation. Balandra argued that Costa failed to raise a genuine issue of material fact because (1) it was undisputed that Costa had a reasonable alternative to tripping over the coaming, and (2) the absence of contrasting paint and a hatch covering were, as a matter of law, insufficient to establish negligence.

II

Pursuant to section 905(b) of the Longshore and Harbor Workers' Compensation Act, the owner of a vessel, in

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[1] A coaming is a "raised frame of wood or steel around a hatchway, skylight, or other opening in the deck of a ship to prevent water from running below." *Webster's Third New International Dictionary Unabridged* 432 (1981).

limited circumstances, may be liable for injuries suffered by longshoremen. One of the duties that the vessel owner has is the "turnover duty of safe condition." *Thomas v. Newton Int'l Enter.*, 42 F.3d 1266, 1268 (9th Cir. 1994). When the vessel owner turns the vessel over to a stevedore, it must be free of any hazards that "present[ ] an unreasonably dangerous work environment to experienced longshoremen exercising reasonable care." *Martinez v. Korea Shipping Corp.*, 903 F.2d 606, 610 (9th Cir. 1994). Whether an unreasonably safe condition exists is a question of fact and is "[g]enerally . . . inappropriate for resolution at the summary judgment stage." *Thomas*, 42 F.3d at 1269.

A

Balandra's first argument in support of summary judgment is that Costa failed to raise an issue of fact regarding an essential element of his case. Balandra contends that Costa was required to show that he had no reasonable alternative to avoid tripping over the coaming, and that Costa failed to make any showing on this issue. Balandra cites *Ludwig v. Pan Ocean Shipping Co.*, 941 F.2d 849 (9th Cir. 1991) to support his argument that such an element is required.

We recently rejected this argument. In *Thomas*, we considered *Ludwig* and held that "whether a hazard is easily avoidable is simply part of the larger question whether a hazard is unreasonably dangerous." 42 F.3d at 1270 (holding that uncovered hatch could be unreasonably dangerous although plaintiff "could have stepped to the right and avoided the open hatch instead of stepping to the left and falling through it"). Costa was not required to show that he did not have a reasonable alternative to tripping over the coaming. Instead, "whether or not a hazard is so easily avoidable or easily rectifiable that given all of the circumstances present it could not constitute an unreasonably

dangerous condition must be factually evaluated on a case-by-case basis." *Id.* at 1271.

B

Balandra's second argument for summary judgment was that the absence of contrasting paint and the absence of a hatch cover were, as a matter of law, insufficient to establish negligence. We disagree. Whether the lack of paint or the lack of a hatch cover were hazards that were "unreasonably dangerous to longshore workers [is] a question of fact for the jury." *Thomas*, 42 F.3d at 1269. Costa introduced the affidavit of Herbert Chatterton, a marine architect, that stated that the lack of paint and a hatch cover were unreasonably dangerous conditions for longshore workers.[2] Accordingly, he raised an issue of fact for the jury.

Balandra argues that despite Chatterton's affidavit, summary judgment was appropriate because the undisputed facts showed that the paint and hatch cover would not have prevented Costa's injury. Balandra argues that because Costa was not looking down, the paint would not have prevented the fall. Whether contrasting paint would have caught Costa's eye is a causation question for the jury to decide. Balandra also argues that because Costa's knee hit the deck before he fell through the hatch, the lack of a hatch cover was immaterial to his injury. Costa also complained of an injured neck and bruised and scraped arms, however, and the cause of these injuries is a question for the jury.

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[2] Balandra argues that Chatterton's affidavit should not be considered because he was not a longshoreman and thus could not be an expert on what is unreasonably dangerous for longshoremen. The district court made no such finding, and we will not do so here. On its face, Chatterton's affidavit raises a material issue of fact.

III

To avoid summary judgment, Costa was not required to introduce evidence that he had no reasonable alternative to avoid tripping over the coaming. Costa merely had to introduce evidence that the hazards presented an unreasonably dangerous work environment for experienced longshoremen exercising reasonable care. Costa did so by introducing his expert's affidavit. Material issues of fact exist as to whether the lack of contrasting paint and a hatch covering constituted an unreasonably dangerous work environment and as to whether these hazards caused Costa's injuries. The district court erred in granting summary judgment. REVERSED and REMANDED.

APPENDIX B

[Filed April 19, 1994]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL COSTA,
Plaintiff,
v.
BALANDRA SCHIFFAHRTS-GESELLSCHAFT
MBH & CO., KG.,
Defendant.

CV 93-1530 TJH (Tx)

ORDER

The Court has considered Defendant's motion for summary judgment, together with the moving and opposing papers.

It is Ordered that the motion be, and hereby is, Granted.

Date: April 14, 1994

Terry J. Hatter, Jr.
United States District Judge